United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1344 **September Term, 1992**

Cyrus V. Edwards,
Appellant
v.
Federal Communications Commission

BEFORE: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the opporition thereto and the reply, and the reply to the Federal Communications Commission's reply to opposition to motion to dismiss, it is

ORDERED that the reply to the Federal Communications Commission's reply be returned to Edwards. The rules of this Circuit do not permit the filing of a reply to a reply. See D.C. Circuit Handbook of Practice and Internal Procedures 33 (1987). It is

FURTHER ORDERED that the motion to dismiss be granted. An appeal to the Federal Communications Commission from a decision rendered by the Federal Communications Commission's Review Board is a "condition precedent to judicial review." See 47 U.S.C. § 155 (c) (7). Because Edwards has not sought review with the full Commission, this court is without jurisdiction to review Edwards' grievances. See Committee tooSave WEAM v. FCC, 808 F.2d 113, 115-16 (D.C. Cir. 1986) (dismissal of petition warranted where appellant fails to exhaust administrative remedies by seeking review before full Commission of decision of FCC staff).

The Clerk is directed to withold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

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No. 92-1344 **September Term, 1992**

Cyrus V. Edwards,
Appellant

v.

Federal Communications Commission
Appellee

BEFORE: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed March 24, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Federal Communications Commission
FCC 92R-59

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-168

In re Applications of

LT/COLONEL
CYRUS V. EDWARDS — File No. BPH-851024MB

BOTT
COMMUNICATIONS, INC. — File No. BPH-851028MG

For Construction permit for
New FM Station. Channel 236C.
Shawnee, Oklahoma

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1992; **Released: July 22, 1992**

By the Review Board: MARINO (Chairman) and GREEN. Board Member BLUMENTHAL absent.

1. The Commission in its Practice and Procedure. 47 CFR § 1.277, has set out with considerable specificity the requirements of briefs and exceptions to initial decisions. By *Memorandum Opinion and Order*, 7 FCC Red 890 (Rev. Bd. 1992), in this case, the Review Board, after repeating those requirements in detail, dismissed the non-complying "Petition for Court Review and Reversal of Ruling," filed January 8, 1992, by Lt/Colonel Cyrus V. Edwards (Edwards), and afforded Edwards an opportunity to refile exceptions in the proper form within ten days of the

release date of the order. Edwards has failed to file a pleading which complies with the requirements of the Commission's rules and policy. We will therefore dismiss his application for failure to prosecute.

BACKGROUND

2. In an *Initial Decision,* 6 FCC Red 7453 (ALJ 1991) *(I.D.),* Administrative Law Judge Walter C. Miller (ALJ) denied Edwards' application for a new FM station at Shawnee, Oklahoma, after disqualifying Edwards on five separate qualifying issues. The ALJ then granted the remaining basically qualified application of Bott Communications, Inc. (Bott). Thereafter, Edwards, who is proceeding without counsel, filed a pleading with the Review Board. By *Memorandum Opinion and Order,* 7 FCC Red 890, the Board dismissed Edwards' pleading because it failed to substantially comply with 47 CFR §1.277. Specifically, the *Order* explicitly noted that Edwards' exceptions substantially exceeded the 25-page limitation; omitted (1) the table of contents, (2) table of citations, (3) a concise statement of the case, (4) a statement of the questions of law presented, and (5) the argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific reference to the record and all legal or other material relied on. The *Order* also stated that the rule requires that exceptions, including rulings upon motions or objections, shall point out with particularly alleged material errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit, or order, if any, on which the exception is based. Edwards was accorded an opportunity to refile his exceptions in the proper form.

3. Rather than comply with the *Order,* however, Edwards filed a letter to the Secretary dated February 4, 1992, announcing his intent to appeal the case to the full Commission. He asserted that he had been allowed inadequate time to refile his exceptions although no extension of time for filing exceptions had been sought. On February 10, 1992, Edwards filed a new pleading with the full Commission entitled Petition for Complete Review of the Shawnee, Oklahoma Case and Reversal of Rulings Made by Judge Walter C. Miller. Thereon, Bott's responsive pleadings filed on January 9 and February 12, 1992, urged the Board to

dismiss Edwards' pleadings or affirm the grant of its application. Bott made no attempt to respond to the merits of the pleadings other than to state they consisted largely of attacks on Bott's application, against which no issues had been specified. Because jurisdiction over the case properly lies with the Board, *see* 47 CFR §0.361 (a), the General counsel's Office informally referred the pleading to the Board on February 24, 1992. *See CSJ Investments, Inc.*, 5 FCC Red 7653, 7655 n.4 (1990) (misdirected pleadings are to be informally referred to the appropriate official who has authority to act on such matters).

DISCUSSION

4. Edwards' latest submission consists of the thirteen page Petition for Complete Review, to which the original non-complying petition dismissed by the Board is appended. In essence, the thirteen page pleading urges the "Commissioners" to read the earlier material submitted to the Board. It does not address the specifics of the purported errors in the I.D., but instead focuses on Edwards' disagreement with the manner in which the ALJ regulated the course of the hearing. Thus, Edwards' pleading continues to exceed and ignore the Commission's page limitation and format for exceptions. *See* 47 CFR § 1.277(c) (The table of contents and table of citations are not counted in the 25 page limit; however, all other contents of and attachments to the brief are counted). Moreover, the failure to point out with particularly the alleged errors in the I.D. impedes any orderly review of the I.D. We have previously held that reviewing authorities have no obligation to sift through the whole record and fashion arguments for the parties. *See Bible Broadcasting Network, Inc.*, 7 FCC Red 432, 433 n.3. Edwards was admonished in the *Hearing Designation Order*, 5 FCC Red 2968, 2970 n.4 (1990) for disregarding the Commission's pleading cycle. The Chief, Audio Services Division, noted that Edwards' derelictions had caused considerable delay and resulted in needless additional time spent by the staff in producing the *Order*. Edwards was further rebuked by the ALJ for deliberately ignoring the ALJ's directions on how to file an acceptable set of proposed findings, and for continually filing unauthorized and untimely pleadings. 6 FCC Red at 7459-7460. And here, he has not

complied with our *Order*. Consequently, we will dismiss Edwards' latest pleading with prejudice for failure to comply with the Commission's rules governing exceptions, and our previous order. *Cf. Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058 (1978) (application dismissed for failure to comply with ALJ's discovery order); *Capitol city Broadcasting Co.*, 7 FCC Red 2629 (1992) (Commission will not hesitate to summarily deny procedurally defective appeal where circumstances warrant such action).

5. Edwards' prosecution of his application without assistance of counsel does not dictate a contrary result. The Commission has held that where an applicant elects to act without counsel, has the burden of becoming acquainted with and conforming to the Commission's rules and procedures. *See CSJ Investments*, 5 FCC Red at 7654; *see also Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739, 740 (1972). The Commission explicitly warned applicants that it would neither excuse nor tolerate disruptions of its processes because an applicant, which undertakes to act as its own counsel, is unfamiliar with the Commission's rules and procedures. *CSJ Investments, supra*. Finally, the Commission announced in 1986 that it would no longer indulge applicants' temporizing activities. *See Hillebrand Broadcasting, Inc.*, 1 FCC Red 419 (1986). It stated that, in light of a growing interest in new and expanded communications services, it was placing a greater emphasis on its responsibility to provide service to the public in the most efficient, expeditious manner possible, recognizing that delay in the initiation of new service disserves the public interest. *Id*. In sum, Edwards was afforded a second opportunity to file exceptions which complied with the prescribed Commission requirements and failed to do so. We therefore dismiss his non-complying pleading, and his application for failure to prosecute.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Complete Review of the Shawnee, Oklahoma Case and Reversal of Rulings Made by Judge Walter C. Miller Thereon, filed by Lt/Colonel Cyrus V. Edwards on February 10, 1992 IS DISMISSED, and his application (File No BPH-851024MB) IS DISMISSED for failure to prosecute in accordance with Commission rules; and

7. IT IS FURTHER ORDERED, That petition for leave to amend filed by Bott Communications, Inc. IS GRANTED, and the amendment

IS ACCEPTED; and

8. IT IS FURTHER ORDERED, That the application of Bott Communications, Inc. (File No. BPH-851028MG) for a construction permit for a new FM station at Shawnee, Oklahoma, IS GRANTED.

FEDERAL COMMUNICATIONS COMMUNICATION

Joseph A. Marino
Chairman, Review Board